Supreme Court, U.S.
FILED
JAN 2 1996
CLERK

No. 95-266

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CARRIE JAFFEE,
Petitioner,
v.
MARYLU REDMOND and VILLAGE OF HOFFMAN ESTATES,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF THE AMERICAN PSYCHIATRIC ASSOCIATION AND THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

RICHARD G. TARANTO
(Counsel of Record)
FARR & TARANTO
2445 M Street, NW
Washington, DC 20037
(202) 775-0184

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

35 AP

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THIS COURT SHOULD RECOGNIZE A PSYCHOTHERAPIST-PATIENT PRIVILEGE UNDER FEDERAL RULE OF EVIDENCE 501	4
A. Rule 501 Directs the Development of a Federal Common Law of Privileges According to Reason and Experience	4
B. A Psychotherapist-Patient Privilege Is Justified by Reason and Experience	9
1. The Proposed Rules	9
2. Legal Consensus	11
3. Professional Understanding	13
4. Evidentiary Benefits	21
II. NO EXCEPTION TO THE PRIVILEGE APPLIES IN THIS CASE	22
CONCLUSION	28

TABLE OF AUTHORITIES

Cases — Page

Addington v. Texas, 441 U.S. 418 (1979) 2
Ake v. Oklahoma, 470 U.S. 68 (1985) 1
Alberts v. Devine, 479 N.E.2d 113 (Mass.), *cert. denied*, 474 U.S. 1013 (1985) 12
Allen v. Illinois, 478 U.S. 364 (1986) 1
Allen v. Smith, 368 S.E.2d 924 (W.Va. 1988) 11, 12
Allred v. State, 554 P.2d 411 (Alaska 1976) 8
Barefoot v. Estelle, 463 U.S. 880 (1983) 1
Branzburg v. Hayes, 408 U.S. 665 (1972) 9
Couch v. United States, 409 U.S. 322 (1973) 9
Doe v. Bolton, 410 U.S. 179 (1973) 18
Doe v. Roe, 400 N.Y.S.2d 668 (Sup. Ct. 1977) 12
Estelle v. Smith, 451 U.S. 454 (1981) 1
Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469 (Alaska 1977) 8
Graham v. Connor, 490 U.S. 386 (1989) 25
Hague v. Williams, 181 A.2d 345 (N.J. 1962) 12
Hammonds v. Aetna Casualty & Surety Co., 243 F. Supp. 793 (N.D. Ohio 1965) 12
Hancock v. Hobbs, 967 F.2d 462 (11th Cir. 1992) 13
Hawaii Psychiatric Soc. v. Ariyoshi, 481 F. Supp. 1028 (D. Haw. 1979) 18
Herbert v. Lando, 441 U.S. 153 (1979) 9
Horne v. Patton, 287 So.2d 824 (Ala. 1973) 12
In re B, 394 A.2d 419 (Pa. 1978) 8
In re Doe, 711 F.2d 1187 (2d Cir. 1983) 9
In re Doe, 964 F.2d 1325 (2d Cir. 1992) 12
In re Grand Jury Proceedings, 867 F.2d 562 (9th Cir.), *cert. denied*, 493 U.S. 906 (1989) 13
In re Grand Jury Subpoena, 710 F. Supp. 999 (D.N.J. 1989) 19
In re Lifschutz, 467 P.2d 557 (Cal. 1970) 18
In re Zuniga, 714 F.2d 632 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983) 12
McDonald v. Clinger, 446 N.Y.S.2d 801 (App. Div. 1982) 12
O'Connor v. Donaldson, 422 U.S. 563 (1975) 2
Parham v. J.R., 442 U.S. 584 (1979) 1
Riggins v. Nevada, 112 S. Ct. 1810 (1992) 1

TABLE OF AUTHORITIES—Continued

Page

Slakan v. Porter, 737 F.2d 368 (4th Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985) 12
Smith v. Murray, 477 U.S. 527 (1986) 2
State v. Evans, 454 P.2d 976 (Ariz. 1969) 8
Trammel v. United States, 445 U.S. 40 (1980) ..... *passim*
United States v. Arthur Young & Co., 465 U.S. 805 (1984) 9
United States v. Burtrum, 17 F.3d 1299 (10th Cir.), *cert. denied*, 115 S. Ct. 176 (1994) 13
United States v. Gillock, 445 U.S. 360 (1980) 6, 9, 23
United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) 23
United States v. Meagher, 531 F.2d 752 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976) 13
United States v. Moore, 970 F.2d 48 (5th Cir. 1992) 13
United States v. Weber Aircraft Corp., 465 U.S. 792 (1984) 2, 5
University of Pennsylvania v. EEOC, 493 U.S. 182 (1990) 5, 8, 24
Upjohn Co. v. United States, 449 U.S. 383 (1981) 3, 22, 25
Washington v. Harper, 494 U.S. 210 (1990) 1
Whalen v. Roe, 429 U.S. 589 (1977) 13, 18
Youngberg v. Romeo, 457 U.S. 307 (1982) 1

Statutes and Rules

26 U.S.C. § 7602 9
28 U.S.C. § 2074(b) 7
§ 2076 ..... 5, 7
Fed. R. Crim. P. 26 6
Federal Rule of Evidence 501 ..... *passim*

Legislative Materials

H.R. Conf. Rep. 1597, 93d Cong., 2d Sess. (1974) 6
H.R. Rep. 422, 99th Cong., 1st Sess. (1985) 7
H.R. Rep. 650, 93d Cong., 1st Sess. (1973) 4, 6
S. Rep. 1277, 93d Cong., 2d Sess. (1974) ..... *passim*

Other Materials

Annotation, *Physician's Tort Liability for Unauthorized Disclosure of Confidential Information About Patient*, 48 A.L.R. 4th 668 12

TABLE OF AUTHORITIES—Continued

	Page
APA, *Guidelines on Confidentiality*, 144 Am. J. Psychiatry 1522 (1987)	14, 24
APA, *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry* (1995)	14
APA, *Statement on Memories of Sexual Abuse* (Dec. 12, 1993)	26
Appelbaum *et al.*, *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 Bull. Am. Acad. Psychiatry & Law 109 (1984)	21
Beigler, "Psychiatric Confidentiality and the American Legal System: An Ethical Conflict," *Psychiatric Ethics* (1981)	14
T. Blau, *Psychological Services for Law Enforcement* (1994)	19
Brown, *Pseudomemories: The Standard of Science and the Standard of Car in Trauma Treatment*, 37 Am. J. Clinical Hyposis 1 (1995)	26
J. Brown & E. Campbell, *Stress and Policing: Sources and Strategies* 43 (1994)	19
Chafee, *Privileged Communications: Is Justice Served or Obstructed By Closing The Doctor's Mouth on the Witness Stand?* 52 Yale L.J. 607 (1943)	8
Cheng, *et al.*, *Confidentiality in Health Care*, 269 J. Am. Med. Ass'n 1404 (1993)	21
Ciccone, *Privilege and Confidentiality: Psychiatric and Legal Considerations*, 2 Psychiatric Med. 273 (1985)	15
E. Cleary, *McCormick on Evidence* (3d ed. 1984)	7
Diamond, "Forensic Psychiatry," *Review of General Psychiatry* (3d ed. H. Goldman ed., 1992)	15
Elkin, *et al.*, *National Institute of Mental Health Treatment of Depression Collaborative Research Program*, 46 Archives of Gen. Psychiatry 971 (1989)	18
S. Freud, *The Standard Edition of the Complete Psychological Works of Sigmund Freud* (J. Strachey ed. 1955)	26

TABLE OF AUTHORITIES—Continued

	Page
S. Halleck, *Law in the Practice of Psychiatry* (1980)	15
Havassy, "Critical Incident Debriefing: Ritual for Closure," *Critical Issues in Policing* (U.S. Dep't of Justice 1991)	19
Howell & Ogles, *Psychologist-Client Privileged Communications Laws for the Fifty States: Duty to Report, Duty of Warn*, 7 Am. J. Forensic Psychology 5 (1989)	12, 24
McGuire, Toal, & Blau, *The Adult Client's Conception of Confidentiality in the Therapeutic Relationship*, 16 Professional Psychology: Research & Practice 375 (1985)	21
McMains, "The Management and Treatment of Postshooting Trauma: Administration and Programs," *Critical Issues in Policing* (U.S. Dep't of Justice 1991)	19
Miller & Thelen, *Knowledge and Beliefs About Confidentiality in Psychotherapy*, 17 Professional Psychology: Research & Practice 15 (1986)	21
Mumford & Schlesinger, *Assessing Consumer Benefit: Cost Offset as an Incidental Effect of Psychotherapy*, 9 Gen. Hosp. Psychiatry 360 (1987)	18
Notes of Advisory Committee, Fed. R. Crim. P. 26 (1944)	6
Proposed Federal Rules of Evidence, 56 F.R.D. 183 (1973)	5, 8, 10
Reese & Hodinko, "Police Psychological Services: A History," *Critical Issues in Policing* (U.S. Dep't of Justice 1991)	19
Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools, 44 J. Legal Ed. 35 (1994)	21
Sharfstein, Musynski & Arnett, *Dispelling Myths About Mental Health Benefits*, Bus. & Health (Oct. 1984)	18
Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. Rev. 893 (1982)	20

TABLE OF AUTHORITIES—Continued

	Page
Shuman, Weiner & Pinard, *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada*, 9 Int'l J.L. and Psychiatry 393 (1986)	20
Slovenko, *Letter*, 151 Am. J. Psychiatry 626 (1994)	16
Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175 (1960)	10, 16
J. Smith, *Medical Malpractice: Psychiatric Care* (1986)	12
M. Smith, G. Glass & T. Miller, *The Benefits of Psychotherapy* (1980)	18
S. Stone & R. Taylor, *Testimonial Privileges* (2d ed. 1993)	7, 8, 11
Taube & Elwork, *Researching the Effects of Confidentiality Law on Patients' Self-Disclosures*, 21 Professional Psychology: Research & Practice 72 (1990)	21
VandeCreek, Miaris & Herzog, *Client Anticipations and Preferences for Confidentiality of Records*, 34 J. Counseling Psych. 62 (1987)	21
Weiner & Shuman, *Privilege—A Comparative Study*, 12 J. Psych. & Law 373 (1984)	20
J. Weinstein & M. Berger, *Weinstein's Evidence* (1993)	5, 6, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-266

CARRIE JAFFEE,

Petitioner,

v.

MARYLU REDMOND and VILLAGE OF HOFFMAN ESTATES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN PSYCHIATRIC ASSOCIATION AND THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

The American Psychiatric Association (APA), with approximately 42,000 members, is the Nation's leading organization of physicians specializing in psychiatry. The APA has participated as *amicus curiae* in numerous cases involving mental-health issues in this Court, including *Riggins v. Nevada*, 112 S. Ct. 1810 (1992), *Washington v. Harper*, 494 U.S. 210 (1990), *Allen v. Illinois*, 478 U.S. 364 (1986), *Ake v. Oklahoma*, 470 U.S. 68 (1985), *Barefoot v. Estelle*, 463 U.S. 880 (1983), *Youngberg v. Romeo*, 457 U.S. 307 (1982), *Estelle v. Smith*, 451 U.S. 454 (1981), *Parham v. J.R.*, 442 U.S. 584 (1979),

Addington v. Texas, 441 U.S. 418 (1979), and *O'Connor v. Donaldson*, 422 U.S. 563 (1975). The American Academy of Psychiatry and the Law, with approximately 1700 members, is devoted to issues at the intersection of psychiatry and the law. With the APA, the Academy participated as an *amicus* in *Smith v. Murray*, 477 U.S. 527 (1986). The members of both organizations have a strong and direct interest in the federal courts' recognition of a psychotherapist-patient privilege that will protect the compelling interest of patients in the confidentiality of treatment-related communications.[1]

SUMMARY OF ARGUMENT

Rule 501 of the Federal Rules of Evidence assigns to the federal courts the responsibility to use their reason and experience to recognize and to shape evidentiary privileges according to the traditional standards for such privileges. The Court has several times confirmed the flexibility of that authority (*e.g.*, *Trammel v. United States*, 445 U.S. 40, 47 (1980); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 803 n.25 (1984)), and such flexibility is unmistakable from the legislative history of Rule 501, which Congress adopted precisely to avoid freezing the law of privilege in place. Rule 501's flexible authority, however, is to be exercised within the bounds set by traditional standards. The Court thus has made clear that any privilege must be carefully justified to ensure that the interests thereby protected are sufficient to outweigh any loss of reliable and probative evidence. *Trammel*, 445 U.S. at 50-51.

A psychotherapist-patient privilege for confidential communications is readily justified—based on the best possible objective sources—under this established standard. Rule 504 of the rules that were proposed to Con-

[1] Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of this Court. Neither *amicus* has any parent or subsidiary companies.

gress specifically recognized the privilege. And every State in the Nation now recognizes the privilege. Professional understanding and ethical rules confirm the basis for this consensus: it is intrinsic to the process of psychotherapy that patients make personal, revealing statements (whether true or false); and breach of therapeutic privacy would predictably work serious harm to the patient, to other people, and to the public interest in ensuring that people seek and obtain needed effective mental-health treatment—an interest that is acutely obvious, and well recognized, in the context of post-trauma therapy for police officers. Denying a privilege thus would invade patients' (and others') privacy and produce patent harms to a valuable confidential relationship—a common-sense conclusion that is amply supported, and nowhere soundly contradicted, by available evidence. Particularly because the reliable evidentiary benefits from disclosing statements made in the course of therapy are often very weak, the social interest in protecting therapeutic confidences—confirmed in the uniform consensus of the States—justifies the privilege.

No exception to the privilege applies in this case, whether a particular State's law is incorporated to give content to the federal common law of privilege, whether state law is looked to generally, or whether the present circumstances are assessed independently. It is important, as this Court recognized in the attorney-client context (*Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)), that any exceptions should be clearly defined and categorical, so that the ability to rely on confidentiality when undertaking therapy is not destroyed by the prospect of later ad hoc, individual-case balancing, which could generate an uncertainty that litigants would exploit to make the real-world price of claiming the privilege prohibitive. Here, Illinois law would recognize the privilege; none of the familiar exceptions to the privilege applies; and the circumstances of a police shooting—where the need for confidential therapy is sharp and other

sources of evidence are routinely available—provide no reason for an exception. Nor does the fact that the therapist in this case happened to be a clinical social worker, licensed to perform psychotherapy by the State, support rejection of the privilege. In this case, in short, the claim of privilege was properly upheld by the court of appeals.

ARGUMENT

I. THIS COURT SHOULD RECOGNIZE A PSYCHOTHERAPIST-PATIENT PRIVILEGE UNDER FEDERAL RULE OF EVIDENCE 501

A. Rule 501 Directs the Development of a Federal Common Law of Privileges According to Reason and Experience

Rule 501 of the Federal Rules of Evidence provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[2] As petitioner acknowledges (Pet. Br. 11), this provision directs the federal courts to develop and refine privileges by applying the "principles" (not the "privileges") of the common law. This Court has accordingly explained that "Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with flexibility to develop rules of privilege on a case-by-case basis,' and to leave the door open to change." *Trammel v. United States*, 445 U.S. 40, 47 (1980) (quoting 120 Cong. Rec. 40891 (1974) (Rep. Hungate) and citing S. Rep. 1277, 93d Cong., 2d Sess. 11 (1974); H.R. Rep. 650, 93d Cong., 1st Sess. 8 (1973)). *See also id.* at 47 n.8 ("In Rule 501 Congress makes clear that [former 28 U.S.C.]

[2] The second sentence of Rule 501, which applies state law to the question of privilege with respect to a claim or defense governed by a state rule of decision, is not at issue at this stage of the present case.

§ 2076 was not intended to prevent the federal courts from developing testimonial privilege law in federal criminal cases on a case-by-case basis 'in light of reason and experience'; indeed Congress encouraged such development.").

The Court confirmed the authority under Rule 501 to adopt new privileges, without rigid limit to those few privileges that had their origin in "common law," in *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984), where the Court acknowledged the existence of a privilege for certain communications made to government safety investigators, explaining that Rule 501 "recognizes the power of the courts to fashion common-law rules of privilege." *Id.* at 803 n.25. The absence of a limitation in Rule 501 to those privileges first recognized by courts rather than legislatures was again confirmed by the Court's approach in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990). Not questioning its power to "create and apply an evidentiary privilege" for academic peer-review communications (which were not protected at common law), the Court acknowledged Congress's intent "to provide the courts with flexibility to develop rules of privilege on a case-by-case basis" (*id.* at 189) and then explained in detail why it would not create the particular proposed privilege (*id.* at 189-95). The entire privilege-specific discussion in the case would have been pointless if Rule 501 authority were limited to those few privileges existing at common law.

Rule 501's flexibility is evident in the path by which it came to be adopted. This Court proposed a specific set of privileges for the new Federal Rules of Evidence (some common-law in origin, others not), together with a proposed Rule 501 that would have limited privileges to that list plus any other privileges "required by the Constitution . . . or provided by Act of Congress." *See* 56 F.R.D. 183, 230 (1973); 2 J. Weinstein & M. Berger, *Weinstein's Evidence* at 501-2 to 501-3 (1993). Congress rejected that approach and instead "substituted the present language

. . . to provide the courts with greater flexibility in developing rules of privilege on a case-by-case basis." *United States v. Gillock*, 445 U.S. 360, 367 (1980). Had Congress wished to limit the courts' authority to the task of modifying those privileges with a common-law origin, it could easily have identified those privileges and said so. Instead, in adding the reference to the "principles of the common law as they may be interpreted . . . in the light of reason and experience" to the references to the Constitution and federal statutes, Congress decided that "the courts may continue to develop privileges, as well as formulate new privileges on a case by case basis." *Weinstein's Evidence* at 501-3.

The House Committee specifically explained that, in "eliminat[ing] all of the Court's specific Rules on privileges," it "left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard," which, it noted, "derived from Rule 26 of the Federal Rules of Criminal Procedure." H.R. Rep. 650, *supra*, at 8. The identified source confirms the flexibility of the Rule 501 standard, for the former Fed. R. Crim. P. 26 was promulgated on the expressed understanding that its standard "does not fetter the applicable law of evidence to that originally existing at common law. It is contemplated that the law may be modified and adjusted from time to time by judicial decisions." Notes of Advisory Committee (1944). The Senate Committee in 1974 also made explicit the intended flexibility, noting that its Rule 501 provided for "a federally developed common law based on modern reason and experience." S. Rep. 1277, *supra*, at 11.[3]

[3] This aspect of Rule 501 was uncontroversial. The House and Senate took different approaches to deciding when state law would govern a privilege issue, with the Conference Committee ultimately adopting the House position. H.R. Conf. Rep. 1597, 93d Cong., 2d Sess. 7-8 (1974).

As petitioner recognizes, this contemplation of flexibility in developing "federally evolved rules on privilege" (*id.* at 12) makes senseless any effort to limit the Rule 501 authority to the task of expanding (or modifying) those privileges that had their origin in judge-made law. No policy evident in Rule 501 makes relevant whether a particular privilege had its origin in the courts as opposed to legislatures (which may itself vary among different common-law jurisdictions). Which privileges originated in which branch of government is often an accident of historical timing and has nothing to do with whether a particular privilege is justified based on "reason and experience." And the fact that "during the 19th century the source of newly created privileges shifted decisively from the courts to the legislatures" (E. Cleary, *McCormick on Evidence* § 75, at 180 (3d ed. 1984)) cannot control Rule 501, which decisively rejects the idea that privilege-recognizing authority is reserved to Congress and instead directs the *courts* to develop privilege law.[4]

Any limitation of Rule 501 to those privileges existing at common law would, in fact, be inconsistent with specific congressional statements about the psychotherapist-patient privilege, which—like, for example, a journalist-source privilege, doctor-patient privilege, and clergy-penitent privilege—is not of common-law origin. *See* S. Stone & R. Taylor, *Testimonial Privileges* § 6.02 (clergy), § 7.01 (physicians and psychotherapists), § 8.02 (journalists) (2d ed. 1993).[5] The Senate Committee ex-

[4] 28 U.S.C. § 2074(b) provides that this Court may not use its *rulemaking* power to create, abolish, or even modify an evidentiary privilege without congressional approval. That provision merely "carries forward" the same limitation in former 28 U.S.C. § 2076. H.R. Rep. 422, 99th Cong., 1st Sess. 27 (1985). The Court held in *Trammel* that this limitation does not apply to the Court's authority under Rule 501. 445 U.S. at 47 n.8 (quoted at pages 4-5, *supra*).

[5] A psychotherapist-patient privilege would not have been at issue in early common law, because the treatment did not come into

plained that Congress "should not be understood as disapproving any recognition of a psychiatrist-patient" privilege, a statement that makes no sense if Rule 501 authority is limited to common-law privileges. S. Rep. 1277, *supra*, at 13.[6]

Rule 501, in short, authorizes the recognition of privileges if justified by "reason and experience" applied to the long-established "principles" governing this issue. The authority, of course, must be "strictly construed" (*Trammel*, 445 U.S. at 50) to ensure that a privilege is recognized only if it " 'promotes sufficiently important interests to outweigh the need for probative evidence.' " *University of Pennsylvania*, 493 U.S. at 189 (quoting *Trammel*, 445 U.S. at 51). But at least where that determination can be made on the basis of objective evidence to guide the courts' inquiry, the standard of Rule 501 is met.

---

general use until well into this century. By then, the *doctor*-patient privilege had become a fixture of state *statutory* law. *See* Chafee, *Privileged Communications: Is Justice Served or Obstructed By Closing the Doctor's Mouth on the Witness Stand?*, 52 Yale L.J. 607, 607 (1943) (all but 17 States recognized doctor-patient privilege in 1943). For psychiatrists, that privilege was the original basis for the psychotherapist-patient privilege. Even so, the Advisory Committee responsible for the proposed Federal Rules of Evidence wrote: "While the common law recognized no general physician-patient privilege, it had indicated a disposition to recognize a psychotherapist-patient privilege, Note, Confidential Communications to a Psychotherapist: A New Testimonial Privilege, 47 Nw.U.L.Rev. 384 (1952), when legislatures began moving into the field." 56 F.R.D. at 242. And a number of state courts adopted a privilege either before or broader than any statutory enactment. *See, e.g., In re B*, 394 A.2d 419 (Pa. 1978); *Falcon v. Alaska Pub. Offices Comm'n*, 570 P.2d 469 (Alaska 1977); *Allred v. State*, 554 P.2d 411 (Alaska 1976); *State v. Evans*, 454 P.2d 976 (Ariz. 1969).

Notably, the attorney-client privilege, though of common-law origin, is now governed by statute in almost all States. S. Stone & R. Taylor, *supra*, § 1.06.

[6] This Court in *Trammel* specifically noted the important values protected by the non-common-law "privileges between priest and penitent . . . and physician and patient." 445 U.S. at 51.

B. A Psychotherapist-Patient Privilege Is Justified by Reason and Experience

The basic standards governing whether a privilege should be recognized are clear, turning here on whether the injury from breach of psychotherapist-patient confidences outweighs any evidentiary benefits. The Court has noted the significance of whether—as is undisputed here—the communications are confidential in character. *Trammel*, 445 U.S. at 51. The Court also has indicated the importance, in making this determination, of whether support exists in the legislative history leading to the Federal Rules of Evidence (*Gillock*, 445 U.S. at 368 n.7) and whether state law recognizes the privilege (*id.* at 368 n.8; *Trammel*, 445 U.S. at 48-50). *See also In re Doe*, 711 F.2d 1187, 1193 (2d Cir. 1983) (conditions for privilege: confidentiality expected, and essential to relationship worth fostering, with litigation benefits outweighed by harm from disclosure) (citing 8 J. Wigmore, *Evidence* § 2285, at 527 (McNaughton rev. 1961)). Following this approach, the Court should recognize that in the case of psychotherapist-patient communications, no less than in the case of attorney-client communications, the compelling evidence is that protection of the confidential relationship through a privilege justifies any loss of probative evidence.[7]

1. *The Proposed Rules.* Among the nine specific privileges adopted by the Judicial Conference and pro-

---

[7] Petitioner cites, as rejecting a privilege, several decisions that in fact involved no holding as to privilege under Rule 501 or any predecessor. Pet. Br. 14. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984) (no Rule 501 issue; ruling as to "clear intent of Congress" under 26 U.S.C. § 7602 with respect to accountants' work papers); *Herbert v. Lando*, 441 U.S. 153 (1979) (First Amendment issue); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (First Amendment issue in state-court case); *Couch v. United States*, 409 U.S. 322 (1973) (Fourth and Fifth Amendment issues decided; noting in passing lower court precedent declaring no accountant privilege; no apparent dispute on that issue).

posed by this Court in 1972 was a psychotherapist-patient privilege. *See* Proposed Rule 504, 56 F.R.D. at 240. The Advisory Committee observed that "many of the [state] statutes simply place the communications on the same basis as those between attorney and client." *Id.* at 243. And the Committee, though taking a generally very restrictive view of the circumstances justifying any federal privilege (*see Weinstein's Evidence* ¶ 501[06]), nevertheless explained that its "doubts attendant upon the general physician-patient privilege are not present when the relationship is that of psychotherapist and patient" and that even Professor Wigmore's stringent "conditions needed to justify the existence of a privilege are amply satisfied." 56 F.R.D. at 242.

The Committee set forth its rationale as "convincingly stated in Report No. 45, Group for the Advancement of Psychiatry 92 (1960)":

> "Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . . , there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment."

56 F.R.D. at 242. The Committee also endorsed the "more extended exposition of the case for the privilege" in Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 184 (1960). *Ibid.*

Congress ultimately decided, of course, not to adopt any specific privileges. That action, however, no more suggests or supports rejection of the psychotherapist-patient privilege of Proposed Rule 504 than, say, of the attorney-client privilege of Proposed Rule 503 or of the clergy-pentient privilege of Proposed Rule 506. To the contrary, the Senate Committee pointedly explained:

> The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rule submitted by the Supreme Court. It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

S. Rep. 1277, *supra*, at 13.

2. *Legal Consensus.* The need for the privilege reflected in the Proposed Rules is compellingly confirmed by the law in the States today. As with the attorney-client privilege, a psychotherapist-patient privilege is uniformly recognized, without exception, by every State in the Nation. *See* Pet. App. 20a; Pet. Br. 31 ("At the present time, every state and the District of Columbia appears to have adopted some protection for confidential communications with a psychiatrist or a clinical psychologist.")[8]; S. Stone & R.

---

[8] Petitioner follows that statement with a footnote (Pet. Br. 31 n.45) incorrectly doubting the existence of a privilege in West Virginia. *See Allen v. Smith*, 368 S.E.2d 924, 926 (W.Va. 1988). Petitioner also says that "[n]o state has adopted the broad privilege fashioned by the Court of Appeals in this case." Pet. Br. 31. But that is a false characterization: the court of appeals expressly

Taylor, *supra*, § 7.01; Howell & Ogles, *Psychologist-Client Privileged Communications Laws for the Fifty States: Duty to Report, Duty to Warn*, 7 Am. J. Forensic Psychology 5 (1989). The States thus have unanimously judged that a privilege is warranted because of the general overriding importance of protecting confidential communications against disclosure in legal proceedings.[9]

The unbreached consensus of the States is bolstered by the reasoning of each of the federal courts of appeals that have given full consideration to the issue. Like the Seventh Circuit in this case, the Second and Sixth Circuits, after thorough analysis, determined that the privilege is justified, because the privacy interests of patients in therapeutic communications demand it.[10] By contrast, the several circuit-court opinions cited by petitioner as rejecting any such privilege (Pet. Br. 20 n.28; Pet. 8) either do not do so, incorrectly find Rule 501 limited to privileges existing at common law, or merely assert the conclusion without any consideration.[11] Thus, the federal

---

"decline[d] to speculate" about the contours of the privilege and declared that its ruling was "confine[d] . . . to a factual situation of this nature" (Pet. App. 22a); and petitioner has not pointed to any recognized exception to the privilege that applies in this case (Pet. Br. 32-35).

[9] The natural counterpart to this consensus is the common recognition that psychotherapists may be liable under state law for breach of confidentiality. *See, e.g.*, J. Smith, *Medical Malpractice: Psychiatric Care* §§ 10.20-10.21 (1986); Annotation, *Physician's Tort Liability for Unauthorized Disclosure of Confidential Information About Patient*, 48 A.L.R. 4th 668; *Horne v. Patton*, 287 So.2d 824 (Ala. 1973); *Doe v. Roe*, 400 N.Y.S.2d 668 (Sup. Ct. 1977); *Hammonds v. Aetna Casualty & Surety Co.*, 243 F. Supp. 793 (N.D. Ohio 1965); *Hague v. Williams*, 181 A.2d 345 (N.J. 1962); *McDonald v. Clinger*, 446 N.Y.S.2d 801 (App. Div. 1982); *Allen v. Smith*, 368 S.E.2d 924 (W.Va. 1988); *Alberts v. Devine*, 479 N.E.2d 113 (Mass.), *cert. denied*, 474 U.S. 1013 (1985).

[10] *In re Zuniga*, 714 F.2d 632, 637 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983); *In re Doe*, 964 F.2d 1325 (2d Cir. 1992).

[11] *Slakan v. Porter*, 737 F.2d 368, 377 (4th Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985), contains one sentence on the issue, which

courts of appeals, to the extent that they have been applied their "reason and experience," have accepted rather than rejected the privilege.

The overwhelming consensus on the issue is the best possible basis for this Court's decision: it provides a readily ascertainable objective foundation for determining how "reason and experience" weigh the importance of protecting the psychotherapist-patient relationship against disclosure. The existence of that consensus also makes it possible to eliminate most if not all of the potential for forum-shopping that would exist if the federal courts rejected, while all States accepted, the privilege at issue. Whatever variation in detail exists on the contours of the privilege, there is no dissent on the basic question presented for decision here: should a privilege exist? This Court should follow this state-law consensus. *See also* note 18, *infra* (noting possibility of incorporating some state law to give content to federal-common-law privilege).

3. *Professional Understanding.* Like the States, psychiatrists have long recognized the compelling need to protect confidential communications against disclosure

---

declares the law "well-settled" and cites a decision that only (and briefly) ruled on the *physician*-patient privilege (*United States v. Meagher*, 531 F.2d 752, 753 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976)). *United States v. Moore*, 970 F.2d 48, 50 (5th Cir. 1992), notes simply that earlier precedent rejecting a *doctor*-patient privilege is binding, but then goes on to explain that even if a privilege existed, it should not cover the patient's identity or the fact or time of his treatment. *In re Grand Jury Proceedings*, 867 F.2d 562, 564-65 (9th Cir.), *cert. denied*, 493 U.S. 906 (1989), holds (with no analysis) that Rule 501 is limited to privileges extant at common law. *United States v. Burtrum*, 17 F.3d 1299, 1301-02 (10th Cir.), *cert. denied*, 115 S. Ct. 176 (1994), decides "only the narrow question of whether to recognize a psychotherapist/client privilege in a criminal child sexual abuse context." And *Hancock v. Hobbs*, 967 F.2d 462, 466 (11th Cir. 1992), contains precisely one sentence on the issue, which declares that "[f]ederal common law does not recognize a psychiatrist-patient privilege," followed by a citation to a footnote from a constitutional decision of this Court (*Whalen v. Roe*, 429 U.S. 589, 602 n.28 (1977)) where the Court noted that the *physician*-patient privilege was not recognized at common law.

and enforced that recognition through ethical principles that reach as far back as the Hippocratic Oath.[12] Thus, the APA's code of ethics, *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry* (1995), requires a physician to "safeguard patient confidences within the constraints of the law" and declares: "Psychiatric records, including even the identification of a person as a patient, must be protected with extreme care. Confidentiality is essential to psychiatric treatment. This is based in part on the special nature of psychiatric therapy as well as on the traditional ethical relationship between physician and patient." Section 4 and note 1; *see ibid.* (referring to "the sensitive and private nature of the information with which the psychiatrist deals"). "Keeping patients' confidences is part of a psychiatrist's ethical and legal duty. Any breach . . . may lead to admonishment, reprimand, suspension, or even expulsion. In a number of states, breach of confidentiality may also be judged to be unprofessional conduct and grounds for suspension or revocation of the psychiatrist's license to practice medicine." APA, *Guidelines on Confidentiality*, 144 Am. J. Psychiatry 1522, 1522 (1987). As petitioner recognizes, comparable ethical principles govern other mental-health professions. *See* Pet. Br. 26 n.33.

The strength and uniformity of these duties are simply inexplicable other than as reflections of the deepest belief, confirmed daily in the conduct of therapy, that effective therapy requires protection against disclosure. *See, e.g.*, Beigler, *supra*, at 221 ("The psychiatrist, by the nature of his work, becomes privy to sensitive information of high potential value to, among others, employers, creditors, legal adversaries, law-enforcement agencies, and

[12] The Hippocratic Oath, in one translation, states: " 'All that may come to my knowledge in the exercise of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal.' " *See* Beigler, "Psychiatric Confidentiality and the American Legal System: An Ethical Conflict," in *Psychiatric Ethics* 220 (S. Bloch & P. Chodoff eds. 1981).

insurance carriers. Yet he cannot perform his work properly unless he can assure his patient of real confidentiality."); S. Halleck, *Law in the Practice of Psychiatry* 30-31 (1980) ("There is general agreement among all writers in the medical malpractice field that confidentiality is an important right of a patient and that the physician is obligated not to breach the patient's confidences. There is complete agreement that confidentiality is even more important in psychiatric practice. . . . [M]ost doctors, and especially psychiatrists, are very careful in protecting the patient's confidences."); Diamond, "Forensic Psychiatry," in *Review of General Psychiatry* 467 (3d ed., H. Goldman ed., 1992) ("There is no disagreement that effective psychotherapy requires a trusting relationship between patient and therapist. The foundation of that trust is the patient's belief that the therapist will maintain the confidentiality of their communications. If the therapist is required by law to breach that confidentiality, therapy becomes difficult, if not impossible. An enforced demand for breach of confidentiality with respect to one patient's communications may affect all patients, for the others may cease to believe—and rightly—that their confidences will be kept confidential."); Ciccone, *Privilege and Confidentiality: Psychiatric and Legal Considerations*, 2 Psychiatric Med. 273, 273 (1985) ("The practice of psychiatry requires the development of a therapeutic alliance between physician and patient; a significant cornerstone to this alliance is the patient's expectation that the psychiatrist will keep secret what is learned about the patient. . . . Privacy, an important component of the doctor-patient relationship in all branches of medicine, is of particular relevance to psychiatry because it is necessary that patients share with the psychiatrist their fears, fantasies, and foibles.") (footnote omitted).

The rationale is not hard to fathom, as it is a particularly strong version of what this Court recognized in *Trammel*, 445 U.S. at 51, about the physician-patient relationship: "the physician must know all that a patient

can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment." As explained in one of the sources cited by the Advisory Committee responsible for the Proposed Rule 504: "The very essence of psychotherapy is confidential personal revelations about matters which the patient is and should be normally reluctant to discuss. Frequently, a patient in analysis will make statements to his psychiatrist which he would not make even to the closest members of his family." Slovenko, 6 Wayne L. Rev. at 184-85.[13] This rationale was recognized by the Advisory Committee responsible for the 1972 Proposed Rules. *See* page 10, *supra*. Even without reference to the need to explore the deepest, unconscious aspects of a patient's psyche, the basic point about the need for confidentiality applies not just to "analysis" in a limited sense but to psychotherapy generally.

Common sense and wide experience show why. People enter into therapy when something is troubling them and, in the course of the therapy, commonly talk about a wide range of matters that, if disclosed, could produce acute embarrassment, destruction of vital relationships, or other damaging consequences to them or others. Patients may talk about a "relationship problem" (as in this case, *see* JA 70-71), about spouses or other family members, about sexual orientation or relations, about employers or coworkers or friends or teachers. In doing so, patients often discuss not only themselves and their initimate feelings and private actions, but also those of other people with whom their lives are intertwined. The reverberations from disclosure of such information—for the patients and for

[13] Petitioner incorrectly suggests that Professor Slovenko has somehow recanted his account of the importance of confidentiality. Pet. Br. 42. The cited letter to the editor offers a cursory *description* of existing case law, conveying frustrated disappointment at the *extent* of the recognized privilege; it does not indicate any lack of conviction about the need for strong protection. Slovenko, *Letter*, 151 Am. J. Psychiatry 626 (1994).

third parties—obviously can be severe, indeed life-altering, whether in the form of divorce, impairment of relations with parents, siblings, or friends, loss of employment, or any number of other adverse consequences that flow readily from the breach of privacy.

Given that such private information is and must be regularly revealed in psychotherapy and that serious harm would often result from its disclosure, it would require a perverse calculation of human incentives to deny that elimination of the privilege would impair psychotherapy, and hence undermine what the best scientific and professional judgments prescribe for the beneficial treatment of many mental-health problems. Patients for whom there was some realistic chance of participation in legal proceedings would inevitably have second thoughts about seeking therapy at all and, if they overcame that reluctance, feel guarded about what they say in therapy; they would need to worry about how any of the statements they make in therapy would sound if taken out of context, leading them either to withhold information or to take steps to "protect the record." Therapists, for their part, would have to think twice about what they write in their records and whether they should sacrifice the degree of completeness counseled by their professional judgment for the alternative benefits of protecting their patients against risks of disclosure.

Without any privilege, the threat of disclosure in a wide range of legal proceedings, from divorce proceedings to employment-discrimination litigation, would be substantial. The threat would be particularly grave if, as petitioner urges, the patient's offering of testimony in any legal proceeding would justify examination of the whole psychotherapist-patient interaction to determine whether the patient's testimony may have been influenced by the course of therapy. The significant potential for intimidation through the threatening of such disclosures could not effectively be controlled without a clear and strong (not to say absolute) privilege.

The predictable result of rejecting a privilege, then, would be not only to breach one of the important remaining spheres of personal privacy,[14] but also to inflict transformative injury on the psychotherapeutic relationship and hence on mental-health care. The real-world human harm would be palpable. The high value of such care is reflected in the fact that it is covered by virtually every health-insurance program in this country. *See* Sharfstein, Muszynski & Arnett, *Dispelling Myths About Mental Health Benefits*, Bus. & Health, Oct. 1984, at 7. That pervasive coverage itself reflects the fact that psychotherapy has repeatedly been shown to be effective in ameliorating symptoms that, for many people, impair their ability to work, maintain basic family relations, and carry out their daily functions. *See* M. Smith, G. Glass & T. Miller, *The Benefits of Psychotherapy* 124 (1980); Elkin *et al.*, *National Institute of Mental Health Treatment of Depression Collaborative Research Program*, 46 Archives of Gen. Psychiatry 971 (1989); Mumford & Schlesinger, *Assessing Consumer Benefit: Cost Offset as an Incidental Effect of Psychotherapy*, 9 Gen. Hosp. Psychiatry 360 (1987). "Society . . . has a discernible interest in fostering the therapeutic treatment of those of its members experiencing emotional turbulence. This interest consists not only in our altruistic concern for our neighbors' well-being, but in our more selfish interest in the effective treatment of those in the community who may pose a threat because of mental illness or drug addiction." *In re Grand Jury Subpoena*, 710 F. Supp. 999, 1010 (D.N.J. 1989).

[14] This aspect of what is protected by the privilege has constitutional roots. *See, e.g., Whalen v. Roe*, 429 U.S. 589 (1977) (informational privacy); *Doe v. Bolton*, 410 U.S. 179, 197 (1973) (doctor-patient relationship in abortion context); *Hawaii Psychiatric Soc. v. Ariyoshi*, 481 F. Supp. 1028 (D. Haw. 1979); *In re Lifschutz*, 467 P.2d 557, 567 (Cal. 1970). The court of appeals here noted: "courts and commentators have focused on an individual's right of privacy, 'a fundamental tenet of the American legal tradition,' to justify the psychotherapist/patient privilege. . . . 'Privacy serves several functions: it allows room for personal autonomy, it permits necessary emotional release, and it promotes free self-evaluation. The privacy rationale, however, regards the privacy of individuals as important not only in fostering these ends, but also as an end in itself. Compelled disclosure is considered inherently wrong because it inflicts two distinct kinds of harm: (1) the embarrassment of having secrets revealed to the public, and (2) the forced breach of an entrusted confidence.'" Pet. App. 19a (quoting *Developments in the Law—Privileged Communication: Part IV*, 98 Harv. L. Rev. 1530, 1544-47 (1985)).

The circumstances of this case illustrate the commonsense, accepted understanding of the need for confidential therapy. "The importance of early psychological intervention following a traumatic event has been widely accepted in working with law enforcement and other emergency personnel." Havassy, "Critical Incident Debriefing: Ritual for Closure," in *Critical Issues in Policing* at 139 (U.S. Dep't of Justice 1991). Thus, police departments now widely provide formally established post-trauma treatment programs. *See* McMains, "The Management and Treatment of Postshooting Trauma: Administration and Programs," in *id.* at 191, 194 (100% of large departments and 69% of small departments); Reese & Hodinko, "Police Psychological Services: A History," in *id.* at 297. Because litigation will routinely be on the officer's mind in this situation,[15] and the very subject of the counseling is the incident giving rise to the litigation, in such "critical incident counseling, . . . [c]onfidentiality is of the utmost importance." T. Blau, *Psychological Services for Law Enforcement* 183 (1994). *See* J. Brown & E. Campbell, *Stress and Policing: Sources and Strategies* 43-44, 54, 113-14 (1994). As the court of appeals observed in this case, Redmond's "ability, through counseling, to work out the pain and anguish undoubtedly caused by [Ricky] Allen's death in all probability depended to a great deal upon her trust and confidence in

[15] Here, for example, petitioner's lawsuit was filed one week after the shooting (JA 1, 9) and respondent Redmond began her counseling "approximately a week or so after the shooting" (JA 100).

her counselor." Pet. App. 23a. Elimination of the privilege thus would pose a direct threat to the widely accepted importance of post-trauma therapy in the present setting—for the police officers themselves, for their colleagues joining them in the line of duty, and for the public being served.

Petitioner makes one brief attempt to suggest that there is a basis in the literature for rejecting the common-sense consensus that protection against disclosure is important to psychotherapy. Pet. Br. 28. But petitioner's argument rests on just one set of three studies that cannot remotely support the suggested conclusion: they do not come close to demonstrating—what is facially implausible and not easy to test systematically—that the known absence of a privilege would not influence patients for whom litigation is somehow in contemplation (the only ones who *could* be influenced), either in whether to seek therapy or how they conduct themselves during therapy. To the contrary, to the extent to which they try to isolate the subgroup of patients for whom litigation is relevant, the studies confirm that the privilege does matter; the studies also make clear that, regardless of privilege law, people all but routinely *assume* that their disclosures will be kept secret; and in one case, they show that, despite facial differences, there was in fact no difference in the law of privilege as applied in the two groups being compared.[16]

[16] The third of the studies, Shuman, Weiner & Pinard, *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada*, 9 Int'l J.L. and Psychiatry 393 (1986), summarizes the results of the earlier studies as well. *See also* Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. Rev. 893 (1982); Weiner & Shuman, *Privilege—A Comparative Study*, 12 J. Psych. & Law 373 (1984). The third study, which compared Quebec and Ontario, found that there was no material difference in the law as applied, because, while Quebec expressly recognized the privilege, Ontario had a *de facto* recognition of protection, so that rates of compelled disclosure were not statistically significant. *Id.* at 409, 411. Obviously, no differential effects on therapy of the nonexistent difference in privilege law could be inferred from this

Not surprisingly, then, other literature post-dating some or all of these studies confirms the importance of the confidentiality guarantee safeguarded by the legal privilege.[17]

4. *Evidentiary Benefits.* The compelling value of confidentiality of therapeutic communications is sufficiently strong to outweigh, in general, any loss of beneficial evidence in legal proceedings. That is particularly so because the evidentiary benefits of breaching therapeutic

study. And this study confirmed what was also evident in the first two studies: people were unaware of any lack of privilege and in fact counted on therapists to protect their privacy (*id.* at 411-12, 413, 414); confidentiality was an expressed concern for a significant number of patients (*id.* at 414); and "topics with legal consequences were most affected by the absence of a privilege" (*id.* at 413).

[17] *See* Appelbaum *et al., Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 Bull. Am. Acad. Psychiatry & Law 109, 115 (1984) (reviewing prior studies, including first Shuman & Weiner study, and showing empirical support for effect of privilege and for fact that people are "overwhelmingly confident that their therapists would protect their privacy"); Taube & Elwork, *Researching the Effects of Confidentiality Law on Patients' Self-Disclosures*, 21 Professional Psychology: Research & Practice 72 (1990) (privilege shown to be important where law is understood and relevant to particular patients); McGuire, Toal, & Blau, *The Adult Client's Conception of Confidentiality in the Therapeutic Relationship*, 16 Professional Psychology: Research & Practice 375 (1985) (patients significantly valued confidentiality); VandeCreek, Miars, & Herzog, *Client Anticipations and Preferences for Confidentiality of Records*, 34 J. Counseling Psych. 62 (1987) (patients strongly value and expect confidentiality); Miller & Thelen, *Knowledge and Beliefs About Confidentiality in Psychotherapy*, 17 Professional Psychology: Research & Practice 15 (1986) (same); Cheng *et al., Confidentiality in Health Care*, 269 J. Am. Med. Ass'n 1404 (1993) (confidentiality important to adolescents seeking counseling); *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J. Legal Ed. 35, 55 (1994) (willingness of law students to seek assistance for substance abuse depended heavily on guarantee of confidentiality respecting bar admission officials).

privacy will very often be weak, thus further tilting the scales in favor of a privilege. Most simply, statements made in the course of therapy—as in a case of post-trauma counseling—will often be highly misleading if taken out of context and presented (in an adversarial contest) in court. A whole range of possibly contradictory statements can be expected in therapy, perhaps especially in therapy that is aimed at helping a patient work through a wrenching emotional experience that is likely to provoke a powerful sense of guilt, self-doubt, or other strong emotions. Yet such statements present obvious grave risks of unreliability and unfair prejudice when exploited by lawyers in the heat of the battle for legal victory.

To counteract such risks, the therapist might have to offer wide-ranging testimony to try to provide a proper context for assessing therapeutic statements. But such efforts are likely to be fruitless, distracting, and grossly intrusive beyond any possible relevance. The therapist might not only have to explain the dynamics of (her method of) psychotherapy, but also present a full picture of the emotional and psychological context in which particular statements were made. The risks of disclosures not even relevant to the proceedings would be substantial. Thus, breaching a psychotherapist-patient privilege will often make little contribution to, and might even undermine, the judicial system's goal of efficiently and fairly finding facts. The "cost" side of the privilege balance cannot justify the harm to patients' interest in psychotherapy that refusal to recognize the privilege would cause.

II. NO EXCEPTION TO THE PRIVILEGE APPLIES IN THIS CASE

This case presents no occasion for the Court to attempt to sketch the full contours of the privilege. Indeed, the Court recognized in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), that—while a rule requiring balancing

of parties' interests in each and every case can destroy the certainty that a privilege requires (*id.* at 393)—the determination of what *categorical* lines to draw to define the scope of a privilege under Rule 501 is necessarily a task for judicial development in common-law-like fashion. *See id.* at 396 ("Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. See S Rep No. 93-1277, p 13 (1974) ('the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis')"). The appropriate question for resolution of this case, then, is whether some articulable category justifying an exception to the privilege applies here. The court of appeals properly concluded that no such exception defeats the privilege properly invoked by respondent Redmond.

To begin with, it is essentially undisputed that this case falls outside any of the few familiar categories of exception to the privilege.[18] Thus, the case involves no direct

[18] Exceptions, like the privilege itself, must be determined as a matter of federal common law under Rule 501. In other contexts involving federal common law, however, the Court has indicated that the content of the federal law in appropriate cases may be borrowed from the applicable state law if strong private reliance interests have been built on such state law (*United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-29 (1979))—an approach that, in the present context, would generally require federal courts to protect the confidentiality of the psychotherapist-patient relationship at least as much as the applicable state law, which presumptively determines the expectation of privacy shaping the relationship. *Cf. Gillock*, 445 U.S. at 368 n.8 (state privilege law relevant). Such an approach would also reduce forum-shopping concerns and the clinical difficulty that would be faced by therapists who had to keep up on and distinguish federal and state law in explaining the limits of privacy protection to their patients. In this case, of course, Illinois law strongly guarantees a privilege to respondent Redmond for her communications with her clinical-social-worker therapist. *See* Pet. App. 21a. And the Court need not decide here

or indirect waiver (by, for example, the patient's placing her mental state in issue in asserting a claim or defense),[19] no threat of imminent harm to others (which might even create a duty to warn on the part of the psychotherapist), and no concerns about child custody or child abuse. *See* Pet. Br. 32-35; Howell & Ogles, *supra*, at 11 (table listing standard exceptions); APA, *Guidelines on Confidentiality*, 144 Am. J. Psychiatry at 1525.[20] Nor is this a case like *University of Pennsylvania v. EEOC*, *supra* (statements of reasons for employment decision not shielded in Title VII suit about discriminatory character of those reasons), where congressional override can be inferred from the fact that the statements at issue are part of the very substantive cause of action defined by Congress. *Compare* Pet. Br. 38.[21] This case is a garden-variety case involving a confidential treatment relationship and a litigant seeking access to the patient's therapeutic statements about events pre-dating the therapy, solely for the purpose of cross-examining the patient when she testifies in court about those events.

---

any general question about how important a particular State's privilege law should be in applying Rule 501 because the same result is reached by looking at state law generally or the law of Illinois in particular.

[19] A tort case brought by a patient based on a "recovered" memory of earlier abuse, where the patient sought damages for mental suffering, might fall into such an exception.

[20] This case does not involve nonconfidential communications, psychiatric examinations conducted under court order (whether for competency or commitment purposes), or contests over the validity of a former patient's will. *See* Howell & Ogles, *supra*, at 11; APA, *Guidelines on Confidentiality*, 144 Am. J. Psychiatry at 1525.

[21] A similar inference might be appropriate where substantive law imposes certain legal duties on a psychotherapist, like a duty to warn, triggered by information revealed in therapy. Such a legal duty might imply a right to make some inquiry (subject to proper privacy protections) into whether the duty-triggering information was in fact learned in therapy.

With no recognized exception to invoke, petitioner suggests a case-by-case balancing to be left in the discretion of the district court. Pet. Br. 31, 40-42. But any such approach would seriously damage the very values protected by the privilege: exceptions must remain well-defined and truly exceptional, or else the *assurance* of protected confidentiality, on which the patient's interests depend, would be lost, and adverse litigants could exploit the uncertainty of standards to make patients pay a prohibitive price for protecting their privacy by invoking the privilege. This Court made just this point with respect to the attorney-client privilege in *Upjohn Co. v. United States*, 449 U.S. at 393, stating: "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." The same principle applies to the psychotherapist-patient privilege at issue in this case.

There can be no categorical exception applicable to this case. Certainly, there is nothing weak about the interest in protecting confidentiality in this setting: post-trauma police counseling conducted in the shadow of litigation (*see* note 15, *supra*). On the other side of the equation, there is unlikely to be much true "need" for this evidence in cases of this kind: the events at issue, judged under an objective legal standard (*see Graham v. Connor*, 490 U.S. 386 (1989); Pet. App. 13a), occur in public and are complete before the therapy; other witnesses are often available (as numerous witnesses were in this case); the patient/officer is subject to deposition (here, 7 months after the events) and to cross-examination at trial; and there will often be police reports and other contemporaneous statements to use in testing the recollection of the patient/officer (*see* JA 140 (post-shooting interview of respondent Redmond at police station)). As the court of

apepals noted, there is a powerful public interest in "encourag[ing] law enforcement officers who are frequently forced to experience traumatic events by the very nature of their work to seek qualified professional help" and the evidentiary need here was "cumulative at best." Pet. App. 22a, 23a.

Unless the privilege is to be destroyed, it cannot be enough to assert (Pet. Br. 22-23) a need to determine if the therapy produced an artificially "enhanced" memory. That "need" can be asserted in *any* case—just as it could always be claimed that the attorney-client privilege should be breached to determine whether the client's testimony was "enhanced" by discussions with the attorney hired to pursue, and to advise the client on how to pursue, a victory in legal proceedings. Yet, if the values served by the attorney-client privilege are sufficiently important to preclude such breach to explore that possibility, so are the values served by the psychotherapist-patient privilege. And, in any event, there is no *more* basis for petitioner's concern about pre-disposed suggestive enhancements of memory in the therapy context than for a comparable concern in the lawyer-client context. Indeed, it is widely regarded as unprofessional for a therapist to make efforts to induce false "memories" in the patient. *See, e.g.*, APA, *Statement on Memories of Sexual Abuse* at 4 (Dec. 12, 1993); Brown, *Pseudomemories: The Standard of Science and the Standard of Care in Trauma Treatment*, 37 Am. J. Clinical Hypnosis 1, 18 (1995) ("Above all, the therapist must avoid leading/misleading inquiry in pursuit of trauma.").[22] Thus, petitioner's speculation is implausible on its own terms and certainly cannot support abrogation of the psychotherapist-patient privilege.

[22] Petitioner misreads (Pet. Br. 23) a passage from a very early work by Sigmund Freud, J. Breuer & S. Freud, *Studies on Hysteria* (1893), in 2 *The Standard Edition of the Complete Psychological Works of Sigmund Freud* 279 (J. Strachey ed. 1955). The passage says nothing about the analyst's trying to implant specific *content* in a patient's mind, only that the analyst, when faced with a patient who declares that she has nothing to say, often must insist otherwise. *See id.* at 268, 270. For later discussions of later psychotherapeutic technique by Freud, see, *e.g.*, "On Psychotherapy" (1905), in 7 *id.* at 255-68; Lecture XXVIII, "Introductory Lectures on Psychoanalysis" (1916-1917), in 16 *id.* at 448-63; and "Analysis Terminable and Interminable" (1937), in 23 *id.* at 210-53. *See also* 23 *id.* at 248 ("we must not forget that the analytic relationship is based on a love of truth—that is, on a recognition of reality—and that it precludes any kind of sham or deceit").

Finally, there is no good reason to deny the privilege to respondent Redmond simply because the city-employed psychotherapist she saw was a licensed clinical social worker rather than a psychiatrist (or psychologist). It would be arbitrary to cut off some class of professionals who are licensed to perform the therapeutic functions for which the privilege is important. Today, as a practical matter, much therapy that would otherwise be performed by psychiatrists or psychologists is being performed by licensed clinical social workers. And no serious line-drawing problems arise if, as with defining who is covered by an "attorney"-client privilege, application of the privilege requires government licensure to engage in psychotherapy, whether as medical service or otherwise. The claim of privilege in this case therefore should be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RICHARD G. TARANTO
(Counsel of Record)
FARR & TARANTO
2445 M Street, NW
Washington, DC 20037
(202) 775-0184

December 29, 1995